

IN THE UTAH COURT OF APPEALS

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Terry A. Messer,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Petitioner and Appellant,)	
)	Case No. 20090414-CA
v.)	
)	F I L E D
State of Utah,)	(September 24, 2009)
)	
Respondent and Appellee.)	2009 UT App 279

Sixth District, Panguitch Department, 090600009
The Honorable Marvin D. Bagley

Attorneys: Terry A. Messer, Moab, Appellant Pro Se

Before Judges Bench, Orme, and McHugh.

PER CURIAM:

Petitioner Terry A. Messer appeals the dismissal of his petition for post-conviction relief as frivolous on its face. In his petition for post-conviction relief, Messer sought relief from a 2003 amended judgment and sentence. Messer asked the district court to reopen the case; resentence him to have his reduced sentence run concurrently, and not consecutively, to the five years to life sentence on his previous conviction; and reinstate his waived appeal rights to allow him to raise issues related to both his conviction and the sentence.

In 2003, the Sixth District Court, Panguitch Department, entered the Amended Judgment and Order Regarding Pending Motions in State v. Messer, Case No. 01160008. The Amended Judgment and Order stated that "[t]he defendant and the State of Utah have agreed to jointly seek an amended Judgment to resolve all pending motions and the potential appeal" and that the court approved the settlement. The Amended Judgment and Order removed a sentencing enhancement, reducing the sentence from nine years to life to five years to life, "to run consecutive to the sentence he is currently serving." The Amended Judgment and Order also stated that "[t]he defendant in open court has waived his right to appeal." Both Messer and his attorney initialed this statement.

Both Messer and his attorney also signed a statement that the Amended Judgment and Order was approved as to both form and content.

The district court did not err in dismissing the petition for post-conviction relief as frivolous on its face. The petition seeks to avoid the 2003 settlement that resulted in a modification in the sentence and waiver of appeal rights. The petition also seeks to set aside the underlying 2002 conviction. His ultimate claim is that his agreement to the settlement was involuntary and the result of duress. Messer challenges an amended judgment and sentence containing a waiver of appeal rights six years after its entry. In addition to being significantly untimely, the petition seeks the relief of reinstating appeal rights, which cannot be pursued by a petition under rule 65C of the Utah Rules of Civil Procedure and must be pursued under State v. Manning, 2005 UT 61, ¶ 31, 122 P.3d 628. If Messer were to file such a motion in the sentencing court, the burden would be on him to demonstrate that he did not knowingly waive his appeal rights. See id. ("[U]pon a defendant's motion, the trial or sentencing court may reinstate the time frame for filing a direct appeal where the defendant can prove . . . that he has been unconstitutionally deprived, through no fault of his own, of his right to appeal.").

Affirmed.

Russell W. Bench, Judge

Gregory K. Orme, Judge

Carolyn B. McHugh, Judge